No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION ON JURISDICTION

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Respondent's Brief on Jurisdiction relies principally upon three cases decided by this Court in support of its contention that the petition for a writ of certiorari was untimely filed. The primary purpose of this memorandum is to demonstrate that none of these cases supports respondent's position. Respondent's attempt to distinguish *Memphis* v. *Brown*, 94 U. S. 715, on the basis of a mistaken conception as to those facts which are pertinent here, is also considered.

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1. *Department of Banking* v. *Pink, 317 U. S. 264.*—In this case the New York Court of Appeals had amended its remittitur to include a statement that a federal question had been decided. The petition for certiorari, in time if considered from the date of the amended remittitur, was held out of time because it was filed more than ninety days after the original remittitur. This Court stated that the incorporation in a remittitur of a statement that a federal question has been decided "could have no different effect on the finality of the judgment than a like amendment of the court's opinion." 317 U. S. at 266. Such a certification is often asked of a state court as late as after a case has been docketed and argued in this Court. *Hammerstein* v. *Superior Court,* 340 U. S. 622, 341 U. S. 491; *Dixon* v. *Duffy,* 342 U. S. 33, 343 U. S. 393. It has no bearing on the relief sought in the original complaint or bill. It has no effect upon the finality of the judgment. Thus, in the *Pink* case it in no way altered what had been adjudicated, but at most added a new recital. In the instant case, on the other hand, the judgment itself was substantially changed. The September judgment for the first time dealt with all three parts of the Commission's order. It was a new and different adjudication, not the same judgment accompanied by an additional recital or statement of reasons.

2. *Toledo Scale Co.* v. *Computing Scale Co., 261 U. S. 399.*—This was a complex patent controversy which lasted at least 15 years. An adequate explanation of the difference between that litigation and this unfortunately must reflect both its length and its complexity. In 1913 the Court of Appeals for the Seventh Circuit sustained the district court's finding that Computing Company's patents were valid and infringed by Toledo Company. 208 Fed. 410. In May, 1913, prior to the issuance of its mandate, the court of appeals denied Toledo's motion for rehearing on the grounds of newly discovered evidence that the patent had been preceded by the prior art, and ordered an accounting. In May, 1914, the district court approved the master's accounting and finally entered a monetary decree in 1919. On October 4, 1921, the court of appeals affirmed that accounting. Although it doubted that the merits of the controversy were still properly before it, it also denied Toledo's motion to reopen the case on substantially the same grounds as Toledo's 1913 motion. 279 Fed. 648, 674. The court granted a stay of its mandate to permit Toledo to petition this Court for a writ of certiorari. 261 U. S. at 401. Toledo's petition for a writ of certiorari was denied by this Court on January 9, 1922. 257 U. S. 657. That same day, January 9, 1922, Toledo filed a bill in the United States District Court for the Northern District of Ohio, seeking

to enjoin the Computing Company from enforcing the decree of the Court of Appeals for the Seventh Circuit on the grounds that that decree was obtained by fraud. The fraud allegations substantially repeated the grounds of its 1913 and 1921 motions. The Computing Company then filed in the Court of Appeals for the Seventh Circuit a petition for a rule against the Toledo Company to show cause why it should not be enjoined from maintaining its Ohio bill. The Court of Appeals for the Seventh Circuit, after a hearing on the petition for the rule, entered an order (quoted in full at 261 U. S. 402) which stated that it had that day received the order of the Court denying the Toledo Company's petition for certiorari (thereby terminating the stay of the Court of Appeals' mandate), and directed the Clerk to issue the mandate to the district court. That mandate required in part [1] that the court below:

> (1) Enter of record our affirmance of the final decree on accounting.
>
> (2) Enjoin Toledo Company from further maintaining its Ohio bill * * *. [281 Fed. 488, 500]

Toledo Company sought and was granted a writ of certiorari in this Court. 259 U. S. 579. It insisted that this Court had jurisdiction to review the original merits of the validity of the patent

[1] The remaining sections pertained to certain sureties and to expenses and attorney's fees.

and of the accounting, and not merely the issues raised by the rule to show cause, a contention which this Court properly rejected. 261 U. S. 399, 417–418.

This case offers no support for the respondent's position. The portion of the mandate of the court of appeals upon which respondent relies did no more than order the district court to "enter of record", as a routine matter, the affirmance of the final decree of accounting contained in the original judgment of October 1921—which judgment had already been brought before this Court in an unsuccessful petition for certiorari. There was thus no new judgment, but merely a direction in the district court, after expiration of the stay of mandate, to enter the original one. In effect the Toledo Company was attempting to petition for certiorari twice from the same decree, once on the way up to this Court and once on the way down from this Court. The fact that, coincidentally, the Court of Appeals for the Seventh Circuit felt it proper to enjoin the Toledo Company from further prosecuting its Ohio action is irrelevant to the question of the finality of the October, 1921, decree as it was entered.

In the instant case, the September 1951 decree of the court of appeals was a new judgment, the first to dispose of the entire case, not a mere order that a prior judgment be entered in the records. The joinder of this direction in the *Toledo* case

with an injunction enforcing the original judgment of the court of appeals—the enforcement proceeding, of course, constituting an entirely different case—does not make the cases similar.

To respondent's contention that the petition for rehearing filed with this Court in *Toledo* contained many of the same arguments as does our brief on this jurisdictional issue there are two very short answers. First, even if *Toledo's* arguments were similar to those presented in the Government's brief in this case, the facts are so different as to make them inapplicable there and clearly to call for different conclusions. Second, respondent is bold indeed to draw an inference from this Court's denial of a petition for rehearing. Such petitions are seldom granted, and, if we may presume, the reasons for their denial are at least as unknown to the Bar as the reasons for the denial of petitions for writs of certiorari.

3. *Dickinson* v. *Petroleum Corp., 338 U. S. 507.*—The question here was the finality, for the purpose of review by a court of appeals, of a district court's decree, prior to the amendment of F. R. C. P. 54 (b). Petroleum had been allowed to intervene in an action involving the proper disposition of certain shares of stock and claims for damages. It made "the same general allegations and demands for relief" as had the other claimants. 338 U. S. at 509. In 1947 the District Court entered a lengthy decree in which it

disposed of all the claims of Petroleum, but reserved for later hearing claims by other parties. Petroleum took no appeal from this decree. In 1948, the court signed a "final decree" which apportioned the recovery as among the other claimants and recited that the issues reserved in the 1947 decree "having been determined by the Court * * * the said decree is hereby made final." The 1948 judgment did not repeat the provisions entered in 1947 with respect to Petroleum or otherwise deal with the issues which concerned Petroleum. See 338 U. S. at 510, n. 1.

The *Petroleum* case thus involved completely different issues from those herein. No second decree in terms was ever entered by the District Court as to Petroleum. Rather, that court stated in 1948 that the 1947 decree then "became final"—a statement the purport of which was certainly not clear. This Court held that inasmuch as the 1947 decree had completely disposed of Petroleum's claims, it necessarily became effective, for purposes of appeal, in 1947. Here as we have shown, no judgment had been entered as to those parts of the claims brought before the court of appeals by both parties which related to Parts I and II of the Commission's order. It was only by the later decree that all of the claims presented by the parties were adjudicated.

4. *Memphis* v. *Brown, 94 U. S. 715.*—Although we are content to rest our argument upon the

cases cited in our main brief (pp. 38–47), respondent's attempted distinction of *Memphis* v. *Brown*, 94 U. S. 715 (Resp. Br. on Jur. 26) so far misses the point as to warrant correction. In that case Brown had moved in the circuit court for a peremptory writ of mandamus against the city of Memphis, directing the city to levy a tax for the satisfaction of the decree he had formerly obtained (20 Wall. 289) upon all the taxable property of the city. This writ was issued on March 30, 1875. Discovering that the tax collector had not included merchants' capital (treated separately by the laws of Tennessee) in the levy, Brown moved for a further peremptory mandamus directing the city to include merchants' capital in its levy. This motion was granted and judgment entered on March 2, 1876. During that same term, on May 20, 1876, the city moved to set aside the March 2 order. This motion was refused "and that order re-entered as the final judgment of the court in the premises." 94 U. S. at 716.

Since the March 2, 1876 and May 20, 1876 judgments were the same and since this Court allowed the writ of error to be taken from the latter on the ground that the lower court had intended it to supersede the former, the case is in point here. Respondent's reference to "the substantial changes effected by the second judgment" is based upon a quoted excerpt from this Court's opinion which

distinguished between the 1875 judgment and the further preemptory mandamus entered in 1876 (Resp. Br. on Jurisdiction, p. 26)—which "for the first time" subjected "a particular class of property to the adjudged taxation"—not upon any difference between the two 1876 judgments. Respondent's statement that the *Memphis* case does not support the Government's position thus rests entirely upon its misconception of which judgments this Court was talking about in the only portion of the opinion relied upon by the Government and pertinent here.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

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